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Supreme Court of the United States

October Term, 1962

Docket No. 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, Deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF PETITIONER, THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF ANDRES SAN MARTIN, DECEASED

THEODORE H. FRIEDMAN
Counsel for Petitioner
1501 Broadway
New York, N. Y.

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y.

THEODORE H. FRIEDMAN
JACOB RASSNER
BENJAMIN GLICKMAN
EVE M. PREMINGER
of Counsel.

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Opinions Below

The opinion of the Court of Appeals, *in banc*, is reported at 306 F. 2nd 461, and also appears at R. 60-89. The opinion and findings of fact and conclusions of law of the District Court are not reported, and appear at R. 47-58.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1962.

Petition for certiorari was filed on September 26, 1962 and granted on December 10, 1962.

The jurisdiction of this Court has been invoked under 28 U. S. C. Sections 1254(1) and 2101(c).

Question Presented

This Court granted certiorari limited to the following question:

Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence? (R. 92)

Statement

Petitioner's intestate, Andres San Martin, claimed that he was in good health prior to the accident of November 5, 1954 aboard respondent's vessel, except that he had a cardio-vascular aneurysm (an enlargement of the major blood vessel leaving the heart) which was entirely non-disabling and which would have remained so but for the accident (R. 4, 16, 20, 23, 51).

The accident occurred when San Martin lost his balance on an inclined, insecure gangway (R. 19-20, 33, 34-35), attached at one end to rollers to a pier and at the other to the ship floating in and moving with the harbor waters. At that time, he was carrying, by order of his superior, a 100 lb. drum of cement (R. 14, 16) up the inclined gangway without any assistance. San Martin contended that this procedure was improper and dangerous (R. 21) and that instead of manually carrying the goods aboard, a pallet, skid or platform, attached to the ship's winches (R. 19), should have been used to lift the goods mechanically from the pier to the ship's deck.

The complaint asserted Jones Act negligence, unseaworthiness of the vessel, and a separate cause of action for

unpaid maintenance and cure and earned wages (R. 2-4), and was given a civil side index number (R. 5).[1]

A jury demand as to all causes of action had been duly endorsed on the original complaint (R. 2). At the outset of the trial, following inquiry by the court, San Martin's counsel argued orally that an action for maintenance and cure was a common law action that existed prior to the establishment of the admiralty jurisdiction of the Federal Court, that the claims relating to maintenance and cure could have been brought in the State Court where petitioner would unquestionably have had a jury trial, and that a jury trial should be granted under the doctrine of "pendent jurisdiction" (R. 8-9).

Counsel's position was rejected in entirety by the trial judge, and prior to the receipt of any evidence, the trial

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[1] The respondent never moved to dismiss the maintenance and cure cause of action for lack of jurisdiction on the civil side, see *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615 (2nd Cir. 1955), or to have it transferred to the admiralty side of the District Court. See *Catherall* v. *Cunard S.S. Co.*, 101 F. Supp. 230, 234 (S. D. N. Y. 1951); see, also, *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 443 (2nd Cir. 1959), cert. den. 359 U. S. 1000 (1959).

Instead, the respondent allowed the maintenance and cure claim to stand unchallenged on the civil side of the District Court, appended to the Jones Act claim, from the time of filing in 1955 to the time of trial in 1960, and employed all of the pre-trial discovery proceedings available to it on the civil side with regard to the petitioner's contentions in both causes of action. Many of these pre-trial procedures, including pre-trial discovery depositions of the petitioner taken by the respondent, would not have been available to the respondent with regard to the allegations relevant to the maintenance and cure claim, had that claim proceeded under the Admiralty Rules. *Miner* v. *Atlass*, 363 U. S. 641 (1960).

Having enjoyed all the pre-trial benefits of treating the maintenance and cure claim as a "civil" matter, respondent, at the moment of trial, took the opposite tack and supported the trial judge's view that the maintenance and cure claim must be treated as one in Admiralty and triable to the court without a jury.

judge directed that all issues relating to maintenance and cure be tried to the court, stating:

> "and if there is any additional testimony necessary, I will hear that after the jury has rendered its verdict." (R. 8)

San Martin presented proof to the jury that the excessive work duty of November 5, 1954, the danger of which he complained and brought to the attention of his superior (R. 21), caused a disabling back injury (R. 20, 23, 27-28, 35), later diagnosed as a herniated disc (R. 49, 50), and aggravated his dormant cardio-vascular condition and rendered it disabling (R. 51-52).

The trial judge submitted 12 separate interrogatories to the jury under a Special Verdict (R. 44-46) including computations of income taxes (R. 45) and computations involving percentage deductions for contributory negligence (R. 46). The jury did not reach the mathematical problems involved because they returned a verdict for defendant on the issue of the negligence of the superior's order and the unseaworthiness of the vessel (R. 44).

The trial judge dismissed the jury and received additional evidence on the maintenance and cure count, specifically as to what further medical treatment San Martin required. On this issue, San Martin presented several physicians, including the former Chief of the Orthopedic Service of the very U. S. P. H. S. Hospital from which San Martin had been discharged as an in-patient, marked "Not Fit For Duty" (R. 50-51). San Martin's physicians testified that he was at the time of that discharge and through to the time of the trial in need of medical care for his back (R. 50-51), for his cardio-vascular condition (R. 51-52, 53) and for his congestive heart failure (R. 53) which was imperiling his life.

The trial judge chose to disbelieve San Martin's physicians on the need for further care (R. 56) and on the existence of congestive heart failure (R. 55) and denied recovery for any period after March 1, 1955, the date of

discharge as an in-patient from the U. S. P. H. S. Hospital. On November 6, 1960, five months after the trial judge's decision, San Martin died of congestive heart failure (see R. 58-59, 61).

Summary of Argument

All of the relevant policy considerations of fair, efficient, inexpensive and simple administration of justice favor single jury trial of the maintenance and cure claim with the Jones Act claim, as has been agreed by all of the learned commentators who have written on the subject.

The district courts which have attempted to follow the procedure favored by respondent, *i.e.*, jury trial of the Jones Act claim and court trial of the appended maintenance and cure claim, have found this procedure troublesome, duplicative and unworkable.

The opinion of the Court below, on behalf of only four of the nine members sitting *in banc*, erroneously concluded that "rigidly drawn" Rules 38 and 39, F. R. C. P., prevent granting a jury trial on the appended maintenance and cure claim notwithstanding that such jury trial might well be "desirable".

The maintenance and cure claim is, in fact, intertwined with and "pendent" to the Jones Act claim arising from the same incident and facts, and under such circumstances a single jury trial of both claims may and should be granted.

A seaman's basic right to a jury trial on his appended maintenance and cure claim may and should be fixed and ineradicable at the time he commences suit, and not be subject to the unpredictable discretion of the trial judge, the fortuitous developments of his litigation, or the success or failure of his Jones Act claim, provided only that the Jones Act claim, when filed, is bona fide and does arise out of the same facts, incident and illness involved in the maintenance and cure claim.

POINT I

It is generally agreed that policy considerations of fairness, simplicity and practicality all favor submission of all the seaman's claims arising out of the same incident to the jury.

In *Romero v. Int'l. Term. Oper. Co.*, 358 U. S. 354, 381 (1959), this Court stated:

> "We are not called upon to decide whether the District Court may submit to the jury the 'pendent' claims under the general maritime law in the event that a cause of action be found to exist".

The instant case, on the single specific question upon which this Court granted certiorari (R. 92)

> "Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?"

calls upon the Court now to decide the issue left open in the *Romero* case.[2]

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[2] Of course, the question upon which this Court has granted certiorari herein is not necessarily one of "pendent" jurisdiction. This Court could decide that a seaman has a right to a jury trial on a claim for unpaid maintenance and cure by reconsidering the result reached, by 5-to-4 vote, in *Romero*, where the Court held that claims arising under the general maritime law do not have an independent civil side jurisdictional basis under 28 U. S. C. § 1331.

Thus, this Court could decide the question now before it in the affirmative by holding that a maintenance and cure claim, arising under the general maritime law, is a claim within 28 U. S. C. § 1331, arising under Federal law, and therefore directly entitled to a jury trial. Such result would avoid the burdening of these working men's damage suits with "the harvest * * * (of the) dragon's teeth * * * sown" by the *Romero* decision (Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 850; 1960), a fair example of which is the instant matter. It is clear that had the minority prevailed in *Romero*, the instant petitioner would have

(Continued on page 7)

Commentators

In the avalanche of scholarly discussion that followed this Court's decision in *Romero* v. *Int'l Term. Oper. Co.*, 358 U. S. 354 (1958), several commentators offered their own answers to the question left open in *Romero* and presently before this Court. Without exception they decided that considerations of fairness, efficient administration of justice, speedy and inexpensive trials, simplification of issues and procedure dictated the submission of all of the seaman's claims to the jury.

After an exhaustive analysis of the topic, Professor Brainard Currie (*The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 58, 63, 64; 1959), stated:

> "• • • the fairest and most efficient procedure is not to reserve the maintenance and cure count (to the court alone) but to submit it to the jury along with the major counts for damages." (p. 58)

• • •

(Continued from page 6)

been entitled as a matter of right to a jury trial of his maintenance and cure claim. See 358 U. S. at 389-390, 393, 413-414; Brennan, J., dissenting in an opinion joined by Chief Justice Warren and Justices Black and Douglas.

Petitioner has not here briefed the complex issues that would be involved on a reconsideration of the *Romero* opinion. Several of the authorities herein cited have, however, dealt comprehensively with the issues raised by the *Romero* decision. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817 (1960); Note, *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 138 (1959).

In the event this Court is willing herein to give reconsideration to the matter dealt with in *Romero*, it is respectfully submitted that it may desire to direct reargument and submission of further briefs, the precise procedure followed when *Romero* was first before this Court. See 356 U. S. 955 (1958).

> "When a Jones Act claim is submitted to the jury, the appended claims for unseaworthiness and maintenance and cure ought also to be submitted (to the same jury)." (p. 63)
>
> • • •
>
> "• • • there is no reason why all three counts should not be submitted to the jury, irrespective of the amount involved in the maintenance and cure count itself". (p. 64)

Professor Kurland (*The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 850; 1960), urged that:

> "• • • the mode of trial should be resolved in the way 'most conducive to the just, speedy and inexpensive disposition of the business of the courts' • • • (and) when the question is ultimately resolved it should be in favor of a single jury trial for all the claims (i.e. negligence, unseaworthiness and maintenance and cure)".

Similarly, Professor Moore had previously stated that (5 Moore's Federal Practice 284; 2d Ed. 1951):

> "When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with the right of jury trial on all the issues".

Basing their affirmative answer on the doctrine of "pendent jurisdiction", the Harvard Law Review stated (73 Harv. L. Rev. 141 at 143 (1959)):

> "In awarding maintenance and cure, a judge must make allowance for sums awarded by the jury on the Jones Act count for lost wages and medical expenses to the end of the voyage. Whether maintenance and cure for other purposes constitutes a separate cause of action is immaterial; to give all three claims to the jury eliminates much confusion and simplifies the

trial, avoiding the necessity of special verdicts and minimizing the danger of inadequate or overlapping awards."

Judicial Decisions

In *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957), Judge Wyzanski was faced with the same issue as is herein involved; whether or not to grant a jury trial on a maintenance and cure claim appended to a Jones Act and unseaworthiness claim. There was no diversity of citizenship between the parties. The plaintiff seaman had filed a civil action against the defendant ship owner. The plaintiff sought, as here, a jury trial as to all of his claims, including the one for maintenance and cure.

Judge Wyzanski reviewed the relevant law and concluded, in advance of this Court's decision in *Romero, supra*, that civil side jurisdiction for the maritime claims of unseaworthiness and maintenance and cure could not be based on 28 U. S. C. § 1331 as matters "arising under the laws of United States" (156 F. Supp. at 300-304).

Judge Wyzanski, nevertheless, concluded that the plaintiff was (156 F. Supp. at 304):

> "entitled to go to the jury on (the unseaworthiness) count because it is pendent to a Jones Act count."

As to the maintenance and cure claim, similarly appended to the Jones Act claim, Judge Wyzanski wrote an incisive analysis of the problems and policy considerations involved (156 F. Supp. at 304-306) and concluded (156 F. Supp. at 306):

> "• • • upon the request of any party to a maintenance and cure controversy, the proper course is for the judge to allow the jury to consider the maintenance and cure count with the Jones Act and unseaworthiness count."

Judge Wyzanski based his conclusion that the maintenance and cure claim, when appended to a Jones Act claim, should be submitted to the same jury on considerations of "pendent jurisdiction" (156 F. Supp. at 304).

He noted that the procedure of submitting the appended maintenance and cure claim to the same jury along with the Jones Act and unseaworthiness counts "has strong practical advantages", for (156 F. Supp. at 304):

> "The basic facts essential to a maintenance and cure recovery are all usually included within a Jones Act or an unseaworthiness recovery. That is, on a Jones Act or unseaworthiness count the seaman may and ordinarily does show his contract relationship, his hospital and medical bills, and (as a guide to ascertaining earning capacity) his rate of wages and maintenance."

The opinion discussed in detail the problems that arise if the District Court judge attempts to determine the maintenance and cure count by himself while submitting the Jones Act claim to the jury, and pointed out that in such instances (156 F. Supp. at 305):

> "* * * the Court does not know whether the jury has reduced plaintiff's recovery on account of contributory negligence, * * * nor whether if the jury has allowed for diminution of earning capacity it has fixed a terminal date nearer the day of the accident than the last day on which maintenance would be due, nor whether the jury has allowed for hospital and doctors' bills paid by third persons, an item which possibly may be recoverable under a Jones Act count * * * even when it is not recoverable on a maintenance and cure count."

Judge Wyzanski referred to "other examples of possible duplication and doubt" (156 F. Supp. at 305) and stated that while a District Court "judge could take steps to avoid

this uncertainty" (156 F. Supp. at 305) by putting to the jury special interrogatories (156 F. Supp. at 305):

> "even then he might have inadequate data to know how much additional maintenance could be awarded without duplication."

Judge Wyzanski stated flatly on the very issue now before this Court that (156 F. Supp. at 305):

> "It is not a satisfactory way of avoiding this dilemma for the judge to keep for himself the decision on cure and maintenance",

and concluded that fair and proper procedure called for allowing (156 F. Supp. at 306):

> "• • • a jury trial on all three counts (Jones Act negligence, unseaworthiness, and maintenance and cure) of the complaint."

Professor Currie, *op. cit.*, 27 U. Chi. L. Rev. at 58, commented on Judge Wyzanski's opinion in *Jenkins*:

> "It is sufficient to note that this careful examination of the problem by an experienced and thoughtful district judge leaves no doubt that the fairest and most efficient procedure is not to reserve (to the Court alone) the maintenance and cure count but to submit it to the jury along with the major counts for damages."

In the First Circuit, the conclusion reached by Judge Wyzanski in *Jenkins* is now apparently the standard procedure. See *Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2d 426, 427-429 (1959), *rev'd on other grounds*, 362 U. S. 539 (1960).

In the Second Circuit, the similar question of whether a claim for *unseaworthiness* joined with a Jones Act claim should be submitted to the jury with the Jones Act claim or reserved to the Court has been decided in favor of single

jury determination. *Bartholemew* v. *Universe Tankships Inc.*, 263 F. 2d 437 (2d Cir. 1959), *cert. denied*, 359 U. S. 1000 (1959). This result was based on three alternative grounds discussed by the majority and concurring opinions. As pointed out by the dissenters in the instant case (306 F. F. 2d at 476, R. 84-85), each of these reasons applies with equal vigor to the submission to the jury of an appended maintenance and cure claim.

The majority in *Bartholomew* held (263 F. 2nd at 447):

> "the Jones Act claim as alleged is so factually intertwined with the maritime (unseaworthiness) claim as to carry it along into the civil side of the District Court for trial with the Jones Act claim to a court and jury".

In an extensive opinion (263 F. 2nd at 443-447) analyzing the possible "complications and injustice" (263 F. 2nd at 446) were any other result to obtain, the court held that a joint jury trial of the Jones Act and unseaworthiness claim was required, principally on the basis of a "pendent jurisdiction" theory (263 F. 2nd at 445, 446, 447).

As will be hereinafter demonstrated (Point II, *infra*), the maintenance and cure claim is also thoroughly "intertwined factually" (263 F. 2nd at 446) with the Jones Act claim, to the extent that separate determination of these claims creates numerous problems of possible overlapping recoveries, doubtful assignments of burden of proof, extensive but necessarily incomplete special interrogatories of juries, and troublesome issues of collateral estoppel.

POINT II

The practice of splitting up the seaman's claims between the court and the jury has proved unworkable.

Prior to a contrary holding in *Jordine* v. *Walling*, 185 F. 2d 662 (3 Cir. 1950), it was the established practice in the several circuits to submit maintenance and cure claims to the jury along with Jones Act claims as a matter of course. See cases cited at Currie, *op. cit.*, 27 U. Chi. L. Rev. at 58, fn. 318-323; Instant Case, 306 F. 2d at 473, 477-478 fn. 3; R. 79, 87 fn. 3.

Promptly after *Jordine*, various able and experienced district judges indicated that they were disturbed by its result because of their satisfactory experience with a single determination of all claims by the jury. See *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890-2 (D. Mass. 1947, Wyzanski, *J.*); *Catherall* v. *Cunard S.S. Co.*, 101 F. Supp. 230, 233-4 (S.D.N.Y. 1951, Kaufman, *J.*); *La-Fontaine* v *The G. M. McCallister*, 101 F. Supp. 826, 827-8, fn. 1 (S.D.N.Y. 1951, Weinfeld, *J.*). Judge Wyzanski pointed out (71 F. Supp. at 891) that application of the doctrine of pendent jurisdiction would resolve the problems created by the *Jordine* decision, but indicated that his right to invoke that doctrine must await the direction of this Court.

In attempting to administer the *Jordine* rule of splitting up the seaman's claims between the court and the jury, the courts have found themselves beset with problems arising out of possible overlapping recoveries, complicated by possible jury reduction of Jones Act verdicts for contributory negligence, and have arrived at conflicting decisions on how to proceed in the morass thus created.

In *Claudio* v. *Sinclair*, 160 F. Supp. 3 (E.D.N.Y. 1958) the district court applied, with some misgiving (see 160 F. Supp. at 4-5 fn. 1), the *Jordine* doctrine, and held that the maintenance and cure claim, though coupled with a Jones Act claim, could not be tried to jury but was re-

quired to be decided by the "Court sitting in Admiralty" (160 F. Supp. at 4). The court then held, after a jury verdict and award of damages for the seaman on the Jones Act claim, that a further recovery on the maintenance and cure claim was *not* precluded, and justified this position stating (160 F. Supp. at 5):

> "* * * the Court instructed the jury that any recovery to which plaintiff was entitled was to be reduced in proportion to his contributory negligence. Conceptions of contributory negligence have no bearing upon, nor is contributory negligence a defense against, liability for maintenance and cure. The plaintiff may not have recovered the full value of his lost wages, and there is no way in which the defendant can show any specific duplication of damages."

In *Lazarowitz* v. *American Export Lines*, 87 F. Supp. 197 (E.D. Pa. 1949) the court reached a contrary result. After the jury found for the plaintiff on the Jones Act claim, the court denied recovery on the maintenance and cure claim it had reserved to itself on the ground that there was no way of determining how much duplication would exist in two awards.

In *Stendze* v. *The Boat Neptune, Inc.*, 135 F. Supp. 801 (D. Mass. 1955, Aldrich, *J.*) the district court went both ways on the manner of determining a maintenance and cure claim reserved to the court and tried simultaneously with a jury trial on an unseaworthiness claim. The court noted (135 F. Supp. at 802):

> "The verdict of the jury for all damages for loss of earnings and for pain and suffering . . . was plainly inadequate except for the fact that there was substantial evidence of contributory negligence, which I instructed the jury would require to proportion the damages if found . . . I think it is clear that this is what they did. Hence the plaintiff has not received all of the . . . lost earnings nor can it be told how much he has received since damages for

> pain and suffering were not liquidated. This is an insuperable obstacle for the defendant (on the issue for establishing the existence of possible duplicate recovery by way of additional award for maintenance and cure). . . . However, the defendant cannot show the specific duplication, and accordingly must fail for want of proof."

Notwithstanding, this decision, the district court "awarded a sum for medical bills and for maintenance, but nothing for wages, which means he cast upon the plaintiff the unsustainable burden of showing the amount which the jury has awarded for wages." Currie, *op cit.*, 27 U. Chi. L. Rev. 1 at 44.

As stated by Professor Currie with regard to the *Stendze* case in particular, and the problem here being reviewed in general (*op. cit.*, 27 U. Chi. L. Rev. at 44-5):

> "If both counts (i.e. unseaworthiness and maintenance and cure) had been submitted to the jury with proper instructions, it seems less likely the plaintiff would have been deprived of the modest protection afforded him by the principle of maintenance and cure."

The only appellate discussion of the effect of possible contributory negligence and jury reduction of the Jones Act award on the court's disposition of the maintenance and cure count occurred in *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911 (2d Cir. 1960). The court there noted but declined to resolve the questions of deduction, assignment of burden of proof and duplication of recoveries (279 F. 2d at 918).

It should be added that the problems of duplication of recovery are not restricted to those arising out of possible reduction of jury verdicts because of the seaman's contributory negligence.

As Judge Wyzanski explained in detail in *Jenkins* (156 F. Supp. at 305), even "with answers to such questions",

i.e., what percentage of the damages were caused by plaintiff's contributory negligence", he (the District Judge) might have inadequate data to know how much additional maintenance could be added without duplication."

In *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911 (2d Cir. 1960), an assault case where considerations of contributory negligence were not a factor, see 168 F. Supp. 153, 155, 160 (S. D. N. Y., 1957), the Court of Appeals noted that the plaintiff seaman withheld from the jury, as he was entitled to (279 F. 2d at 917),

> "proof of the cash value of board and lodging and the instruction to the jury did not include this item as part of the seaman's damages for loss of wages. (Accordingly) a later allowance for board and lodging as maintenance will not constitute double payment or duplication."

The Court of Appeals, therefore, remanded the case to the District Court judge for further proceedings, in which the trial judge was to decide whether or not evidence of cost of board and lodging while ill and receiving beneficial medical care had been presented to the jury, and if not the trial court was to undertake further proceedings to determine these issues and make an appropriate maintenance and cure award.

Obviously, had the maintenance and cure count been submitted initially to the jury, evidence as to the cost of plaintiff's board and lodging during the relevant period would have had to have been submitted along with all other proof of his damages, and the jury's general verdict would have determined the case in a single award rendered at the conclusion of its deliberations.

It is noteworthy of the confusion caused by separating the trial of the maintenance and cure claim from the Jones Act claim to compare *Runyan* v. *Great Lakes Dredge & Dock Co.*, 141 F. 2nd 396 (6th Cir. 1944), where the Court held the seaman estopped from bringing a maintenance and cure

action because of a prior Jones Act recovery, with *Smith* v. *Lykes Brothers-Ripley S.S. Co.*, 105 F. 2nd 604 (5th Cir. 1939), *cert. den.* 308 U. S. 604 (1940), holding to the contrary.

Examples of "possibilities of duplication and doubt" (*Jenkins* v. *Roderick*, 156 F. Supp. at 305) abound. Thus, if a plaintiff has alleged two injuries (*e.g.*, a fractured nose and headaches due to a post-concussion syndrome, both coming from a single blow on the head when a block fell from above), the jury might determine that the shipowner was liable (see *Johnson* v. *United States*, 333 U. S. 46 (1948)); and credit the plaintiff's physicians on the claim of fractured nose, but disbelieve the plaintiff's physicians as to the less demonstrable claim of headache. Unless the jury was interrogated not only as to the percentage of contributory negligence found and the amount allowed for medical and hospital expenses, loss of earnings, pain and suffering (see *Jenkins* v. *Roderick*, 156 F. Supp. at 305), but further as to which of the plaintiff's injuries the jury found did occur, the trial court would be unable to proceed accurately on the reserved maintenance and cure claim. If the trial court does not interrogate the jury as to which of the injuries it allowed damages for, it might grant the plaintiff maintenance and cure for cost of board, lodging and medical treatment related to both the alleged injuries, although the plaintiff submitted his allegations as to two conditions to the jury and was disbelieved by the jury as to one.

Nor can it be assumed that merely knowing the amount the jury gave for the medical expenses would provide the necessary information. If the plaintiff had used two or three physicians to treat the disputed injuries, the jury may have discarded the claim for the cost of one or two of the physicians, finding the expense thereof as not being necessary, and thus have allowed less on the claim for medical expenses, and yet have been persuaded by the plaintiff that the period of his disability (and right to

maintenance) was extensive and that he did indeed suffer both claimed injuries.

Even a defendant's verdict on the Jones Act claim does not resolve the collateral estoppel and assignment of burden of proof problems involved in determining the reserved maintenance and cure count. Where both basic issues are contested—*i.e.*, the existence of negligence or unseaworthiness, and the occurrence of any illness or injury—a defendant's verdict on the Jones Act claim could be based on a negative finding on either of the two questions. However if the defendant's verdict on the Jones Act claim is based solely on a negative finding to the first question, the seaman is still entitled to receive maintenance and cure for whatever illness or injury arose during the ship's service, and the trial judge will not know on which ground the jury made its verdict. On the other hand, if in fact the jury's verdict for the defendant was based on a negative finding on the latter question, the seaman should be estopped from receiving maintenance and cure.

Clearly where the jury has found against one of the parties on any issue, that result is binding, notwithstanding that the same issue is also relevant to the court-reserved maintenance and cure claim. *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959); *La Fontaine v. G. M. McAllister*, 101 F. Supp. 825, 828 (S. D. N. Y., 1951).

As all of the discussion and examples above referred to demonstrate, factual intertwining on the issue of damages —and even on the issue of liability, *i.e.*, the existence of any injury—with the Jones Act claim is clearly present. While it is conceded by the petitioner that a maintenance and cure claim and a Jones Act claim are not identical, it is respectfully submitted that it has been sufficiently demonstrated that they are highly intertwined, and that just, efficient and expeditious administration of justice compel that both claims be tried to the same trier of fact and at the same time, when arising from the same incident and injury.

If is obvious that an affirmative answer by this Court to the question upon which it has granted certiorari presents a clear solution to the specific problems discussed above. Maintenance and cure claims would be submitted to the jury with the Jones Act claim and the jury instructed as to all of the items of damage: cost of beneficial medical care (cure); cost of the seaman's board and lodging while in need of beneficial medical care (maintenance); wages to the end of the voyage, which are the three elements of a maintenance and cure claim (see *Pacific Steamship Co.* v. *Peterson*, 278 U. S. 130 [1928]; *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911, 914-5 (2d Cir. 1960); *La Fontaine* v. *The G. M. McAllister*, 101 F. Supp. 825, 828 [S. D. N. Y. 1951]). These were the three items sought in the second cause of action in the instant case which were taken from the jury and reserved for trial to the court (R. 4, 8).

Instructions to the jury as to these items of damage along with instructions as to the principles of liability relating to maintenance and cure, together with the direction to the jury that no reduction in the award, if any, should be made as to the three items constituting maintenance and cure on the ground of contributory negligence of the plaintiff, if any, is all that would be required. With these instructions, and the other relevant instructions as to the different rules of liability under the Jones Act and seaworthiness doctrines and maintenance and cure, the jury would be capable of rendering a single simple result in a seaman's personal injury action, and by so doing eliminate all of the problems of possible duplication and overlapping and assignment of burden of proof which have beset the District Court judges in the cases hereinabove cited and have resulted in an unresolved conflict in the various courts that have discussed those issues.

POINT III

The learned Court below erred in overlooking the strong policy considerations in favor of jury trial.

In denying the seaman's right to a jury trial on his appended maintenance and cure claim, the court below did not expressly or impliedly indicate disagreement with the serious policy considerations discussed in Points One and Two, *supra*. However, Judge Friendly, on behalf of four members of the *in banc* Court, held that a district judge could not, under any circumstances, "submit to the jury for final determination a claim for maintenance and cure which has been joined with (a substantial claim under the Jones Act" (306 F. 2d at 469, R. 72). In this respect, Judge Friendly spoke for a minority of the court, for three judges held that "jury trial of joined claims for maintenance and cure was here required" (306 F. 2d at 469, 475-478; R. 72, 83-88), and two others concurred in the result only by holding that the trial "judge has discretion to submit to the jury a claim for maintenance and cure arising out of the same event as the Jones Act claim" (306 F. 2d at 469, 478; R. 72, 88-89).

Judge Friendly's position that jury trial as to the maintenance and cure claim is absolutely barred is based on the contentions:

(a) That Rules 38 and 39 of the Federal Rules of Civil Procedure do not provide for such jury trial, and their failure to do so is fatal to the claim;

(b) That maintenance and cure claims are totally different than Jones Act and unseaworthiness claims and, accordingly, the concept that such claim is "pendent" to the Jones Act claim and on that basis entitled to a jury trial is inapplicable.

(a) Federal Rules of Civil Procedure 38 and 39

Judge Friendly states that F.R.C.P. 18(a), which lists the situations where civil claims may be joined *does not* operate to exclude the joinder of maritime claims "which the Courts already permitted" (306 F. 2d at 469, R. 72). Yet he then asserts that F.R.C.P. 38 and 39, which list the situations where jury trial may be had of civil claims, *does* operate to exclude jury trial of maritime claims which he later concedes were also formerly permitted by the courts (306 F. 2d at 473, R. 79). See also, Currie, *op cit* 27 U. Chi. L. Rev. at 58 fn. 318-323.

In justifying this application of the Federal Rules of Civil Procedure solely to joinder of the maintenance and cure claim, Judge Friendly cited several cases from other Circuits and noted that "in the (Second) Circuit claims for maintenance and cure have long been joined with Jones Act claims, apparently, as here, without objection, even when there was no diversity" (306 F. 2d at 469 fn. 7; R. 72-73 fn. 7).

Thus, a prior "long practice" of joinder was held by Judge Friendly as sufficient to broaden the language of F.R.C.P. 18(a) to include maritime claims and wipe away the barrier of inapplicability of the Federal Rules of Civil Procedure to admiralty proceedings explicitly stated in R.R.C.P. 81(a)(1). It is hard to understand why the similar "long practice" of submission of maintenance and cure claims to a jury, when such claims are appended to a Jones Act claim, does not justify that procedure and effect a broadening, if such be necessary, of the provisions of F.R.C.P. 38 and 39.

Interestingly, each one of the Court of Appeals cases cited by Judge Friendly in his footnote supporting permissibility of joinder (306 F. 2d at 469 fn. 7, R. 72-73 fn. 7) in which juries were demanded involved not merely a joinder, on the civil side, for procedural purposes, of the maintenance and cure claim with the Jones Act claim, but

an actual submission of the maintenance and cure claim to the jury, along with the Jones Act claim. It is noteworthy that in one of the cases inexplicably cited with approval by Judge Friendly, *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515, 516 (1st Cir. 1940).

> "... the trial judge directed a verdict for the defendant on the first (Jones Act) count and submitted the case to the jury on the second (maintenance and cure) count."

This result obviously involves a complete acceptance of petitioner's contention that once the maintenance and cure claim is appended to the Jones Act claim, the seaman's right to a jury trial on the maintenance and cure claim becomes fixed and continuous, regardless of the outcome of the Jones Act claim, provided merely that the initial Jones Act claim was substantial and bona fide and not colorable. This was precisely the court's holding in *Lindquist* v. *Dilkes*, 127 F. 2d 21, 25 (3rd Cir. 1942), also cited with approval by Judge Friendly below in the aforementioned footnote.

Nevertheless, Judge Friendly concluded, on the basis of Rules 38 and 39 of F. R. C. P., that a seaman could not be entitled to a jury trial on the maintenance and cure claim, notwithstanding appendage to a related, substantial Jones Act claim; a point on which five of his brethren in the Court of Appeals differed with him, three having held that in the circumstances a jury trial must be provided, and two more having held that it was at least discretionary with the trial judge.

Also, directly in disagreement with Judge Friendly and his three colleagues below on this point is Professor Moore, and the numerous decisions cited in his treatise, all to the effect that F.R.C.P. 38 and the Federal Rules of Civil Procedure, (5 *Moore's Federal Practice* 40, 41; (2d Ed.):

> "Neither enlarge nor restrict the right to jury trial . . .

> This principle of no enlargement nor restriction (by the Rules) of the right of jury trial has received complete judicial approbation."

Furthermore, the statutory section (28 U. S. C. § 2072) authorizing the rule-making procedure in the federal courts specifically states that the Federal Rules of Civil Procedure cannot in any way abridge the right to a jury trial. See also, *Beacon Theatres Inc.* v. *Westover*, 359 U. S. 500, 509 fn. 15 (1959).

It would be hard to understand why this Court, in *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354, 381 (1959) and in *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 331 fn. 4 (1960), would have specifically referred to the question of whether or not to invoke the doctrine of "pendent" jurisdiction to support submission to a jury of claims under the general maritime law when appended to a Jones Act claim as being left open, if the possibility of such submission were clearly barred by the language of Rules 38 and 39 of the F. R. C. P., as Judge Friendly claims.[3]

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[3] Thus, Professor Currie, *op. cit.*, 27 U. Chi. L. Rev., at 62-63 has stated:

> "The (Supreme) Court (in *Romero*) has adopted the theory of 'pendent' jurisdiction,' which, in its maritime version, was invented and employed almost exclusively for the purpose of justifying the submission of maritime claims to the jury. It is difficult to believe that the affirmative implication of this holding for the jury question can be without significance".

Nor have any commentators who have carefully examined the instant question ever concluded that the language of F. R. C. P. 38 constitutes a barrier to this Court's determination that considerations of "pendent" jurisdiction favor a jury trial on the maintenance and cure claim in the circumstances.

See,

Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 4-6, 41-51, 58-65, esp. 59, 62-63 (1959);

(Continued on page 24)

A final demonstration of the invalidity of the argument that F. R. C. P. 38 and 39 are insurmountable barriers to the petitioner's contention notwithstanding the policy reasons in support of petitioner's position, is found by analyzing the decision of the Second Circuit in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2nd Cir. 1959), *cert. den.* 359 U. S. 1000 (1959).

There the Second Circuit held that considerations of "pendent" jurisdiction justified and required that a jury trial be granted to a seaman on his unseaworthiness claim when appended to a Jones Act claim arising out of the same incident, although diversity of citizenship was not present.

Judge Friendly in his opinion below expressly adopted and approved this *Bartholomew* decision (306 F. 2d at 471, 473-4; R. 76-77, 80).

There can be no question that both unseaworthiness and maintenance and cure claims arise from the general maritime law of the United States. *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354, 356, 389, 393 (1959); *Pacific SS Co.* v. *Peterson*, 278 U. S. 130, 134 (1928). Compare, particularly, the historical discussion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 543-549 (1960), as to the origin of the law relating to unseaworthiness claims, with the historical discussion in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 727-730 (1943), with regard to the origin of maintenance and cure claims.

(Continued from page 23)

Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 849, 850 (1960);
73 Harv. L. Rev. 138, 142-146 (1959);
5 Moore's Federal Practice 284 (2d Ed. 1951);
Gilmore & Black, The Law of Admiralty 262 (1957).

See also,

Jenkins v. *Roderick*, 156 F. Supp. 299, 304-306 (D. Mass. 1957).

Thus, as Judge Learned Hand stated [*Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555, 558 (2nd Cir. 1950), cert. den. 341 U. S. 904 (1951)]:

> "the obligation of 'maintenance and cure' * * * is concededly quite as entirely the creature of the maritime law as the 'obligation' to furnish a seaworthy ship."

See also *Braen* v. *Pfeifer Oil Transp. Co.*, 361 U. S. 129, 132-133 (1959).

Judge Friendly attempts to justify the apparent conflict between the decision in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2nd Cir. 1959), *cert. den.* 359 U. S. 1000 (1959), which finds no insurmountable barrier in F. R. C. P. 38 and 39 to granting a jury trial to an unseaworthy claim appended to a Jones Act claim, and his decision in the instant case, denying jury trial to an appended maintenance and cure claim on the basis of those Rules, by asserting that a Jones Act and unseaworthiness claim are "both claims in tort, generally predicated on the same facts and carrying the same measure of damages (and) 'are so intertwined factually that they cannot, as a matter of practice, be separated into pieces'" (306 F. 2d at 471, R. 76).

But if Judge Friendly was willing to avoid the alleged effect of "rigidly drawn" (306 F. 2d at 470, R. 74) Rules 38 and 39, F. R. C. P., to justify submitting an appended unseaworthiness claim to a jury, it cannot logically be contended that the same Rule bars submitting a maintenance and cure claim to a jury.

Judge Friendly's opinion below attempts to turn this corner by setting forth at length the lack of identity between maintenance and cure claims and Jones Act or unseaworthiness claims, ending with an assertion that the claims are "totally different" (306 F. 2d at 472, R. 78).

However, once it is conceded, at least *sub silentio*, that the issue of whether or not to grant a jury trial on a maintenance claim appended to a Jones Act claim turns on whether the claim is "different" or "intertwined" with the Jones Act claim, it is clear that Rules 38 and 39, F. R. C. P., are hardly obstacles to the desired conclusion, and it remains only for this Court to determine as a matter of judicial policy which result it favors.

(b) Intertwining of Maintenance and Cure Claim With Jones Act Claim

The issue of whether or not a maintenance and cure claim is or is not intertwined with the Jones Act and unseaworthiness claims to which it is appended, the policy considerations relating to problems of duplicative and overlapping recoveries, and the difficulty of procedure and assignment of burden of proof if separate trials to jury and judge are required, have been set forth at length at Points I and II, *supra*.

Joint jury trial of the maintenance and cure claim with the Jones Act claim to which it is appended is so clearly favored by all of the policy considerations that have been hereinabove described and by all of the learned commentators who have spoken on the question, that no additional attempt will be here made to answer Judge Friendly's contention that the maintenance and cure claim and Jones Act claim are so "totally different" as to negate joint jury trial.

In fact, Judge Friendly himself seems to negate the contention of "difference," insofar as they relate to joint jury trial, when he notes in his opinion below that were it not for his belief that "rigidly drawn" F. R. C. P. 38 and 39 prevent it, he would think it "desirable" for a judge, in the circumstances here involved, to be able to send the related maritime claims to the same jury which is deciding the Jones Act claim (306 F. 2d at 470, R. 74).

In support of his contention that "the relationship of a claim for maintenance and cure to one for personal injury under the Jones Act is wholly different from the allegation of unseaworthiness in addition to negligence as a basis for the personal injury claim" (306 F. 2d at 472, R. 77), Judge Friendly cites this Court's decision in *Pacific S.S. Co.* v. *Peterson*, 278 U. S. 130 (1928), which held that receipt of maintenance and cure did not bar a subsequent action under the Jones Act whereas a verdict on a claim of unseaworthiness would bar a subsequent Jones Act suit (*Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316; 1927).

Why this decision should be read as constituting a barrier to jury trial of a maintenance and cure claim as yet unpaid, which claim is appended to a Jones Act claim for damages arising out of the same incident, is baffling. *Pacific S.S. Co.* v. *Peterson*, *supra*, dealt only with the pleadings, and did not in any way indicate approval of overlapping recoveries, and contains nothing to suggest that if a seaman did obtain maintenance and cure benefits and thus collected his medical expenses, board and lodging costs during disability and medical care and wages to the end of the voyage, he might again obtain the same items of damage in the subsequent negligence or unseaworthiness action.

The opinion below also suggests (306 F. 2d at 472, R. 77, 78) that *res judicata* considerations justify submission of an unseaworthiness claim to the jury along with the appended Jones Act claim, but do not similarly support such submission of a maintenance and cure claim.

Yet, as has been clearly established herein (see Point II, *supra*), collateral estoppel problems will also arise with regard to disposition of a maintenance and cure claim by a different trier of facts following adjudication of a Jones Act claim based on the same injury and incident.

Thus, even the policy reasons set forth by Jud Friendly in support of trying the unseaworthiness claim

to the same jury which tries the Jones Act claim must be recognized as substantially applicable to the desirability of similar submission of the appended maintenance and cure claim.

POINT IV

The seaman's right to a jury trial should not depend on the fortuitous circumstance of diversity.

The opinion of the court below, on behalf of four of the nine members, held that a non-diversity plaintiff was not entitled to a jury trial on his appended maintenance and cure claim, notwithstanding that a diversity plaintiff would be so entitled under the "saving to suitors" clause (306 F. 2d at 465-468, R. 66-71). Judge Friendly stated that while a "jury trial is needed to give the diversity plaintiff the same right in the Federal that he would have had in the state court, there is no similar basis for Federal solicitude with respect to the non-diversity plaintiff" (306 F. 2d at 474-475, R. 82).

This position makes the choice of forum determinative of basic rights and basic differences in the mode of trial, a result which is traditionally avoided wherever possible and should not be countenanced unless it is unavoidable.

To economize time and expense, a plaintiff often will want to proceed in a federal court on his Jones Act and unseaworthiness claims, and join therewith his appended maintenance and cure claim. According to Judge Friendly and the opinion of the court below, a non-diversity plaintiff who, like the petitioner here, has three claims arising from a single set of facts, must split his claims and try some aspects of them twice, in different courts, if he would preserve his rights to jury trial.

Thus, if a non-diversity plaintiff-seaman is to obtain a jury trial on his maintenance and cure claim, he must bring

that claim in state court. It is historical and practically automatic that Jones Act claims are filed by seamen in federal court. See *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354, 372 fn. 31, 409-410 (1959).

Surely, this result of inducing seamen to split their causes of action arising out of the same employment, accident and illness, and bring the Jones Act negligence claim in the federal court, and the maintenance and cure claim in the state court is ill-recommended in terms of fairness and effective judicial administration.

This Court "with an eye to the practicalities of admiralty personal injury litigation" has recognized that "full utilization of (the seaman's) remedies for personal injury" may and should be "accomplished only in a single proceeding". *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 224, 225 (1958):

> "It is but a step from that holding (in *McAllister*) to a holding that a claim for unseaworthiness may also be submitted to (the same) jury (which decides the Jones Act claim) * * * (and to a holding of) the propriety of also submitting the maintenance and cure count to the same jury in the interest of convenience and efficiency as well as of securing to the seaman the full utilization of his remedies in a single proceeding."
>
> Currie, *op. cit.*, 27 U. Chi. L. Rev. at 64.

A plaintiff-seaman is entitled to know, at the time he selects his forum, whether the basic right of jury trial will be accorded to him in that forum.

If he is a diversity plaintiff he unquestionably has a jury trial in the federal court on all of his claims.

If he is a non-diversity plaintiff, he is entitled to know, in advance, that provided that his Jones Act claim is bona fide (which does not mean that he must necessarily succeed before the jury on it) a maintenance and cure claim ap-

pended to that Jones Act claim and arising out of the same employment and incident will be tried in the Federal court by the same jury which decides the Jones Act claim.

If such a plaintiff's right to a jury trial is subject to the mere exercise of the discretion of the trial judge, which is to all effects and purposes not reversible nor necessarily predictable, or may be eliminated because the Jones Act claim though bona fide is unsuccessful, then he enters the federal court with his maintenance and cure claim at his peril and with the basic right of jury trial exposed to the fortuitous developments of the litigation.

In such circumstances, a well-advised non-diversity seaman-plaintiff, seeking a jury trial on his maintenance and cure claim, must turn to the security of the state court, where his jury rights are fixed and ineradicable.

An affirmative decision by this Court on the question now before it will, however, provide certainty to all seamen that the basic right of jury trial on their maintenance and cure claims is fixed and ineradicable from the time they enter federal court, provided merely that they properly demand a jury trial and that the maintenance and cure claim is properly appended to a bona fide Jones Act claim arising out of the same facts and incident.

This certainty and simplicity is long overdue in this area of the law dealing with simple workingmen's efforts to obtain compensation for industrial injury, and will constitute an authoritative approval of the return to the eminently satisfactory procedure of so submitting appended maintenance and cure claims to the jury which was followed for many years in the courts of the Federal system.

The record here demonstrates that diversity in fact, although not pleaded, did exist in this case. The petitioner's intestate, the plaintiff, at the time of filing having been a New York resident born in Spain and thus a citizen

of Spain or New York, and the respondent having set forth in its answer that it was a foreign, *i.e.*, non-New York, corporation (R. 2, 5, 9, 39, 70-71).

The instant action was filed on June 23, 1955, and thus the amendment of 28 U. S. C. Section 1332(c) on July 25, 1958 (72 Stat. 415) negating diversity of citizenship if the corporate defendant herein had its principal place of business in New York, by its own terms does not apply. See *Lorraine Motors, Inc.* v. *Aetna Casualty & Surety Co.*, 166 F. Supp. 319, 320 (E. D. N. Y. 1958).

The court below unanimously agreed that where diversity of citizenship exists a seaman's right to a jury trial on a maintenance and cure count is absolute, but disagreed as to whether on the record either the trial court or the Court of Appeals should have recognized the existence of diversity jurisdiction and granted a jury trial on that ground. (Compare 306 F. 2d at 465-468, R. 66-71, with 306 F. 2d at 477 fn. 2, R. 86-87 fn. 2.)

Although certiorari was not granted by this Court as to this issue, it is here called to the Court's attention in the event the Court believes that issue incidental to the matter being reviewed or included within the general terms of the question upon which certiorari was granted (R. 92), and therefore properly to be considered herein. See, *e.g.*, *Boynton* v. *Virginia*, 364 U. S. 454, 457 (1960); *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 303 (1938); see also, *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 226 (1958); *Beacon Theatres, Inc.*, v. *Westover*, 359 U. S. 500, 501 (1959).

It is respectfully submitted that the courts below were required to exercise the diversity jurisdiction if it in fact existed, inasmuch as jurisdictional facts are always before the court and are required to be recognized by it *sua sponte*. It is unquestionable that a federal court will not dismiss for want of jurisdiction if diversity does appear on the record, even if not pleaded; jurisdiction is one aspect of modern litigation which always yields to fact.

As stated by Judge Clark, dissenting below (306 F. 2d at 477, R. 86), the refusal in the instant case to recognize the facts of diversity jurisdiction and the jury trial privilege which arose therefrom was:

> "cavalier treatment of perhaps the most cherished of all procedural rights and is not justified on the record before us."

The contention of the court below that the jurisdictional allegations in the pleadings herein refer solely to the Jones Act (306 F. 2d at 463, 468; R. 61-62, 69-71), and that failure specifically to refer to the fact of diversity as a jurisdictional basis waived the plaintiff's rights to a trial by jury on the maintenance and cure count (306 F. 2d at 468, R. 69-71), is sufficiently answered by this Court's recent statement in *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962) that:

> "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."

Diversity jurisdiction having in fact existed, the courts below were in error in denying petitioner the basic right of jury trial on the maintenance and cure claim.

Conclusion

The result reached by the court below was based on an admitted "rigid" interpretation of Federal Rules of Civil Procedure 38 and 39, a narrow interpretation of the factual intertwining of maintenance and cure claims with Jones Act claims, as compared to the intertwining relationship of unseaworthiness and Jones Act claims, and a doctrinaire and formalistic attitude to the actual presence of diversity jurisdiction and the effect of the fortuitous lack thereof. As was aptly stated by Professor Moore in discussing the very question here involved and criticising the type of result reached by the court below (5 Moore's *Federal Practice*, 285; 2d Ed.):

> "[T]he history of procedure teaches that a technical and unrealistic approach to a problem is a prolific source of trouble."

The discussion hereinabove reveals that the result favored by respondent herein and granted by the court below has already been "a prolific source of trouble" to the District Court judges charged with making maintenance and cure awards after trial to a jury of the related Jones Act claim. An establishment of this result as the maritime law of the land by way of approval by this Court would perpetuate the "source" and cause a continued increase of the "trouble".

Furthermore, and aside from all considerations of simplified trial procedure, favorable as they may be to the instant petitioner, the Court here deals with a critical, basic and cherished right and privilege—the availability of a jury trial.

It is not without significance that this Court has most recently stated (*Simler* v. *Conner*, — U. S. —, 31 L. W. 4223; decided February 18, 1963):

> "The federal policy favoring jury trials is of historic and continuing strength."

This Court has assiduously demonstrated, throughout the years, that a seaman's right to jury resolution of the disputed issues relating to his claims for damages due to industrial injury is an important part of this historic and continuing policy, *Michalic* v. *Cleveland Tanker, Inc.*, 364 U. S. 325, (1960); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107 (1959); *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521 (1957); *Jacob* v. *City of New York*, 315 U. S. 752 (1942).

This policy may and should be maintained by an affirmative answer to the question now before this Court.

By reason of the foregoing, a seaman who joins a claim for unpaid maintenance and cure with a claim for Jones Act negligence is entitled to a jury trial on the maintenance and cure claim issues, and the question upon which this Court has granted certiorari may and should be answered in the affirmative.

Respectfully submitted,

THEODORE H. FRIEDMAN
Counsel for Petitioner
1501 Broadway
New York, N. Y.

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y.

THEODORE H. FRIEDMAN
JACOB RASSNER
BENJAMIN GLICKMAN
EVE M. PREMINGER
of Counsel.